## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 14,035 and 14,231

WIBC, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
CROSLEY BROADCASTING CORPORATION, *Intervenor*

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ORDER

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Filed June 16, 1958

Before EDGERTON, Chief Judge, and WILBUR K. MILLER and WASHINGTON, Circuit Judges.

PER CURIAM: These cases came on for consideration on the transcript of the record and were argued by counsel.

After consideration the Court is of the view that since Commissioner Craven's vote was decisive in effecting the entry of the orders here complained of, he should not have voted without having heard oral argument, such argument having been requested and not clearly waived. See *Bay State Beacon, Inc.*, 3 R. R. 1464 (1947); *WBNX Broadcasting Co.*, 4 R. R. 205 (1947); 47 U. S. C. § 409(b) (1952). For this reason the Commission's orders will be vacated, without prejudice to such proper steps as the Commission may desire to take to maintain uninterrupted television service to the public on Channel 13 in Indianapolis, through the intervenor or otherwise, pending final decision. The Commission should reset the case for oral

argument. Any final order which may thereafter be entered may be brought before this Court for review in the usual manner in a new proceeding. Under the circumstances, and inasmuch as the question may not hereafter arise, the Court does not reach the question whether Commissioner Craven is disqualified to vote in this case, and expresses no opinion on the subject.

Accordingly, it is ORDERED by the Court that the orders of the Federal Communications Commission appealed from herein be, and they are hereby, vacated and that these cases be, and they are hereby, remanded to the Federal Communications Commission for further proceedings consistent with the views above expressed.

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On Intervenor's Petition for
Rehearing En Banc

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Decided September 25, 1958

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* These cases are again before us on a petition for rehearing *en banc* filed July 1, 1958, by the intervenor, Crosley Broadcasting Corporation, in which it is contended (1) that objection to Craven's participation was waived, and (2) that Craven's participation had no effect on the result.

Objection to Craven's participation was based on two grounds: (a) that he had not heard oral argument which was held before he became a commissioner, and (b) that he had previously been employed by one of the parties. As to the second basis, we said in the order complained of,

". . . the Court does not reach the question whether Commissioner Craven is disqualified to vote in this case, and expresses no opinion on the subject." So the order was based, as it said, solely on the fact that the decisive vote was cast by one who had not heard oral argument.

It was not claimed in argument that Craven's possibly disqualifying previous employment had been waived. It was said that his participation in oral argument had been waived; and the basis for saying so was the announcement that any absent commissioner might take part, to which there was no objection. But Craven was not then an "absent commissioner"—he was not a commissioner at all. That is the reason we said in the order that oral argument before him had not been "*clearly* waived."

The intervenor seeks to show that Craven's participation had no effect on the result, although it was stated by the Commission that his vote was necessary to avoid an impasse. As a matter of fact, without him, six commissioners voted. Three of them voted for Crosley and the other three voted in other ways, as a result of which Crosley had three votes out of six. The petition for rehearing reasons that three votes were sufficient. It says: ". . . [O]nly the concurrence of a plurality—as distinguished from a majority—of the quorum required by section 4(h) is necessary for legal action." This is a meaningless statement, because a plurality of a quorum of four cannot be less than a majority of it.

Section 4(h) is 47 U. S. C. § 154(h) and is as follows: "Four members of the Commission shall constitute a quorum thereof. The Commission shall have an official seal which shall be judicially noticed." From this the intervenor reasons that, although seven were present and six voted (as long as Craven abstained), three votes would control the Commission's action because § 4(h) says that four members shall constitute a quorum. According to this

reasoning, three votes would control, no matter how many were present and voted.

The truth is that when six voted, it took four to control; that is why the Commission insisted that Craven vote. When he did, there were seven participants and it still took four to control; hence his vote was decisive.

The petition for rehearing *en banc* is denied.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1958

No. 14,035 and No. 14,231

WIBC, Inc., *Appellant,*

v.

Federal Communications Commission, *Appellee,*
Crosley Broadcasting Corporation, *Intervenor.*

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Filed: October 10, 1958
Joseph W. Stewart, Clerk

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Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges.

**Order**

It is ORDERED by the court that the opinion filed September 25, 1958, denying the petition for rehearing *en banc* be, and it is, amended as follows:

By deleting therefrom the following sentence in lines 24, 25 and 26 on page 3 of the slip opinion:

> "This is a meaningless statement, because a plurality of a quorum of four cannot be less than a majority of it."

and substituting therefor the following:

> "This is an incorrect statement. When a quorum is present, the Federal Communications Commission may act, but only on the vote of a majority of those present. This is manifest not only from its action in the present case, but also from previous pronouncements. *WHEC, Inc.*, 10 R. R. 521; *WJR, The Goodwill Station*, 11 R. R. 1321. Its practice in that respect is in accord with the authorities concerning the action of Congress as well as administrative agencies. *Brown* v. *District of Columbia*, 127 U. S. 579, 586 (1888); *United States* v. *Ballin, Joseph & Co.*, 144 U. S. 1 (1891); *Frischer & Co.* v. *Bakelite Corp.*, 39 F.(2d) 247, 255 (C.C.P.A.), *cert. denied* 282 U. S. 852 (1930); *Olsen Co.* v. *State Tax Comm'n*, 109 Utah 563, 168 P.(2d) 324 (1946); *Adkins* v. *Citizens Board*, 112 W. Va. 171, 163 S. E. 853 (1932). In the latter case the court said: 'It is the common law that where joint authority is involved, a quorum being present, legal action can be taken by a majority and by none less.'"

*Per Curiam.*

Dated: October 10, 1958

## APPENDIX B

COMMUNICATIONS ACT OF 1934, AS AMENDED.

*Section 4(h):*

"Four members of the Commission shall constitute a quorum thereof. The Commission shall have an official seal which shall be judicially noticed." Act of June 19, 1934, c. 652, § 4, 48 STAT. 1066, 47 U.S.C. § 154(h).

*Section 402(g):*

"At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by section 10(e) of the Administrative Procedure Act." Act of June 19, 1934, c. 652, § 402, 48 STAT. 1093, as amended, 66 STAT. 718, 47 U.S.C. § 402(g).

*Section 409(b):*

"The officer or officers conducting a hearing to which subsection (a) of this section applies shall prepare and file an initial decision, except where the hearing officer becomes unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision. In all such cases the Commission shall permit the filing of exceptions to such initial decision by any party to the proceeding and shall, upon request, hear oral argument on such exceptions before the entry of any final decision, order, or requirement. All decisions, including the initial decision, shall become a part of the record and shall include a statement of (1) findings and conclusions, as well as the basis therefor, upon all material issues of fact, law, or discretion, presented on the record; and (2) the appropriate decision, order or requirement." Act of June 19, 1934, c. 652, § 409(b), 48 STAT. 1096, as amended, 66 STAT. 721, 47 U.S.C. § 409(b).

ADMINISTRATIVE PROCEDURE ACT.

*Section 10(e):*

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." Act of June 11, 1946, c. 324, § 10(e), 60 STAT. 243, 5 U.S.C. § 1009(e).